



36<sup>TH</sup> AMERICA'S CUP

**AMERICA'S CUP ARBITRATION PANEL**

**ACAP36/13**

**IN THE MATTER**  
of the Protocol  
governing the 36<sup>th</sup> America's Cup

**IN THE MATTER**  
*of an Application by*

NYYC – American Magic (“**American Magic**”)

*hereinafter the “**Applicant**”*

***regarding Auckland ACWS Entry Fee***

**6 November 2020**

**AMERICA'S CUP ARBITRATION PANEL**

**Case No. ACAP36/13**

**DECISION**

## THE APPLICATION

1. On 15 October 2020, NYYC – American Magic filed an application (the "**Applicant**", respectively the "**Application**").
2. The Applicant filed the Application mainly in order to challenge the request made by COR to "*all Competitors for payment of a further entry fee of USD300,000.00 each under art 7.6(a) for the Auckland ACWS Regatta provided in art 2.1 (a) (iii)*" (§12 of the Application).
3. The Applicant summarized its position in this respect as follows (§25 of the Application):

*"NYYC – American Magic argues:*

- a. *The ACWS Auckland and the Christmas Cup are the one and same regatta, for which no additional entry fee is payable:*
- b. *Art 7.6(a) provides for payment of only one fee of USD 300,000.00, not multiple fees of USD 300,000.00:*
- c. *As a matter of equity and fairness, no additional entry fees should be sought from competitors, particularly until all Competitors, including the Challenger of Record, have paid their existing entry fees obligations as required by art 7.*
- d. *There has been a failure of the obligations of good faith and in the spirit of friendly competition which the New York Court of Appeals in Mercury Bay imposed under the terms of the Deed of Gift".*

4. At point 63 of the Application, the Applicant made the following request for relief:

### ***"Relief Sought***

*63. In addition to the interim relief respectfully sought above, NYYC-American Magic respectfully seeks the following final orders of the Panel:*

- a. *That each Competitor provide the Panel with satisfactory evidence of all payments they have made and the date of payment in satisfaction of their obligations under art 7;*

*and;*

- b. *The Christmas race and the ACWS Auckland Regatta are the one and same regatta;*
- c. *That no entry fee is payable for the Christmas Race or the ACWS Auckland Regatta;*

*or alternatively;*

- d. *That Art 7.6(a) and art 2.3 is interpreted to mean only a single-entry fee of USD300,000.00 is payable by each Competitor for all ACWS events (save for the ACWS Portsmouth Regatta); and*
- e. *That a fee of USD300,000.00 paid for the ACWS Cagliari Regatta by a competitor satisfies their financial obligations under art 7.6(a);*

*and;*

- f. *If none of the above final orders are granted, then no penalty shall be applied, nor shall there be any consequences for any late payment of the sum due for the ACWS Auckland regatta provided payment is made by a reasonable time and date to allow a fair opportunity for an international payment to be made;*
- and;
- g. *That the costs of this application and its determination be payable by the Challenger of Record”.*
5. At point 4 of the Application, the Applicant also sought an interim order from the Panel as follows:
4. *Pending resolution of this application, NYYC – American Magic respectfully requests an order of the Panel suspending the request of the Challenger of Record to Competitors to pay any entry fee for the America’s Cup World Series (“ACWS”) Auckland Regatta that is due today.*
6. Having been asked by email by the Panel to “*advise as to whether or not [it] oppose the interim Order sought, and if so, reasons for so opposing it, and any prejudice suggested to be suffered*”, COR stated the following by email dated 15 October 2020:

*“COR agrees to a temporary suspension of payment of the entry fee for the ACWS Auckland Regatta until determination of Case 13 by the Panel or earlier agreement of the parties.*

*COR was prepared to agree a further delay pending resolution of this dispute without the intervention of the Panel,*

*It is important that this is resolved soon; the ACWS Regatta will not pay for itself, and the event is in two months.*

*This is copied to the teams”.*

## **RESPONSES TO THE APPLICATION**

7. On 23 October 2020, in accordance with the Panel’s Directions 01 dated 15 October 2020, COR, Ineos Team UK and ETNZ submitted Responses to the Application.
8. In its Response COR submitted the following executive summary of its position:
- “1. *The Applicant seeks various forms of relief, but essentially it wants to be relieved from having to pay the entry fee for the Auckland ACWS. In support of its application it has advanced a number of misconceived and flawed arguments. These are answered in some detail below, but the short point is that Article 7.6(a) of the Protocol means what it says, namely that “no later than 3 months before an ACWS Event, each Competitor shall pay to COR the sum of USD 300,000.” The Auckland ACWS is due to take place between 17 and 20 December 2020, which means that payment became due on 17 September 2020 and is now overdue.*

2. *That obligation to pay is unaffected by the fact that the Christmas Cup is also going to take place between 17 and 20 December 2020. The two events will be on different days. There is nothing inequitable about requiring the Applicant to pay. It is what the Protocol requires them to do. The fact that previous ACWS events have been disrupted by COVID-19 does not provide any basis for relaxing the requirement to pay”.*

9. COR’s request for relief was the following:

*“(i) an order that all Competitors are immediately to pay to the Challenger of Record the entry fee of USD 300.000 for the ACWS Auckland;*

*(ii) mediation to resolve any differences between the COR and the Defender on the ACWS Auckland and Christmas Race Conditions; and*

*(iii) an order for the costs, fees and expenses of and associated with this Application”*

10. ETNZ submitted that it *“considers the demand by COR for an Entry Fee to be invalid, opportunistic, and that it would totally inequitable for it to be found valid. We support the request by American Magic seeking an order confirming that no entry fee is payable for the Christmas Race or the ACWS in Auckland”*. In fact, ETNZ argued in substance that:

*“4. It was envisaged that all these regattas would be one-off events at stand-alone venues and the structure of the Entry Fees prescribed in the Protocol reflected this requiring each Competitor (including the COR) to pay an entry fee of US\$ 300,000 no later than 3 months before an ACWS Event”.*

*“8. The Defender never contemplated that COR would seek to charge an Entry Fee as part of the arrangements recorded in Protocol Amendment no 7 but in retrospect and given their current stance, it appears the wording of the amendment may have been deliberately drafted that way in an attempt to provide such an opportunity.*

*9. We agree with the position of American Magic that the two events [Auckland ACWS and Christmas Race] are in fact the one and same regatta and no additional entry fee is payable” and indeed “There is no separate regulatory permit for the Auckland ACWS as a stand-alone regatta” (ETNZ’s Response to the Application).*

11. Ineos Team UK submitted that (i) *“From the date of Protocol Amendment 07, it was understood that Article 7.6(a) required a single USD 300,000 (three hundred thousand US dollars) entry fee, which would be applied to “the payment of any costs associated with the Preliminary Regattas”, which included both the Christmas Race and the ACWS”,* (ii) *“Despite the clear intentions set out in Article 7.6(a), we anticipate that the Challenger of Record may point to Article 7.9 of the Protocol, amended pursuant to Amendment No. 3”* and (iii) *“We fully agree with NYYC-American Magic’s submission that it is wholly unfair for Challengers to be allowed to violate the terms of the Protocol as regards payment of entry fees and related bonds”.*

12. Ineos Team UK further “agreed with the requests for relief contained in the *Application*” and, in addition, asked that the Panel make the following orders:

*“(i) Other than in relation to the entry fee, which forms the subject matter of this arbitration, any unpaid entry fees must be settled in accordance with the Protocol by each Challenger within 14 days of the date of the Panel’s direction. Any entry fees paid in compliance with such Order should then be shared between the Competitors who have already paid in compliance with the Protocol.*

*“(ii) Failure to pay unpaid entry fees within such 14 days, would amount to a breach of the Protocol under Article 7.7(b) following which the Panel would enforce its rights to exclude such Challengers from future participation in the competition”.*

### **ADDITIONAL SUBMISSIONS**

13. On 25 October 2020, COR submitted that:

*“Having read their [i.e. ETNZ’s and Ineos team UK’s] submissions, which contain new matters (e.g. Sections 10-14 and 17 of the Ineos Response) and documents (specifically a letter from COR 36 dated 14th December 2018, and a copy of a request for permit submitted by ACE to the Hosts in relation to the COR events), pursuant to Article 6.2 of the ROP the Respondent hereby request that it be given the opportunity to file additional written submissions in response to such new matters and documents”.*

14. As a result, the Panel gave COR, ETNZ and Ineos Team UK the opportunity to file additional submissions limited to the “*new matters and documents*” referred to by COR in its request of 25 October 2020 (Directions 02 dated 26 October 2020). Only COR and ETNZ filed additional submissions (respectively on 28 and 29 October 2020). Their positions were in substance the following:

15. COR submitted that (i) its right to request to each Competitor to pay the sum of USD 300,000 for the Auckland ACWS “*is clearly provided for by Article 7.6(a) of the Protocol*” and that “*For the avoidance of doubt, the Challenger of Record is not requesting additional funds pursuant to Article 7.9 but is requesting payment of the entry fee due for the Auckland ACWS pursuant to Article 7.6(a) of the Protocol*” and that (ii) “*the Protocol (Article 2.1) names the Preliminary Regattas and expressly lists the Auckland ACWS and the Christmas Race. The events were always be intended to be two separated events within a certain time frame*”, and the fact that the Permit issued by the Minister of Transport on 5 October 2020 does not separately list the Auckland ACWS is irrelevant.

16. ETNZ submitted that:

*“4. Our stance remains that it is not a stand-alone regatta from the Christmas Race in respect of which no entry fee is payable, crucially the Protocol specifies the same dates for both the Christmas Race and the Auckland ACWS.*

*[...]*

6. The wording of Clause 4.1 of the HVA is reflected in the s 200A Permit, the HVA did not provide any jurisdiction for ACE to seek a separate permit for the Auckland ACWS to be conducted “within the same period”. It is in fact an adjunct of the Christmas Race and is able to be conducted under the permit issued for the period 17-20 December 2020.

7. The Defender has not said that the permit does not cover the Auckland ACWS or that it cannot go ahead at all, the point is that as the dates for each have not been separately defined, in practical terms it is simply the one and same regatta.

8. The wording of the permit is clear, it is a Declaration of a Major Maritime Event for the specified dates between 17 December and 20 December inclusive and as the Auckland ACWS is to be sailed within this period (on a day or days yet to be agreed) – it is authorised by the permit as issued but it is not a separate event.

9. There is no breach of the Protocol or any contract with COR or for that matter Prada, by ACE”.

## REPLY TO THE RESPONSES

17. On 2 November 2020, the Applicant submitted a Reply to the Responses in which it in substance submitted as follows:

*“4. The Panel are respectfully invited to also draw conclusions from the failure of the Challenger of Record to offer any substantive evidence to substantiate its claim of additional costs for the ACWS Auckland, above what it will incur for the Christmas Cup, despite invitation and now multiple opportunities to do so.*

*5. At no time has the Challenger of Record accounted for any revenues received, including from sponsors and the EUR23m fee payable by its related entity PRADA S.p.A., under a sponsor agreement dated 1 March 2020, of which EUR12m has been paid or is payable.*

*[...]*

*9. The ACWS Auckland is no more than a belated subdivision of the Christmas Cup to meet third party obligations. It ought not be allowed to become, in the absence of evidence of substantial additional costs being incurred, an inequitable additional charge leading to an unjust enrichment.*

*10. It is respectfully submitted, the obvious fair and equitable outcome is for the ACWS Auckland Regatta be deemed to be part of the Christmas Cup for the purposes of art 7.6(a) and that no additional entry fee be payable by Competitors, because it is being held within the same period reserved for the Christmas Cup, for which a substantial entry fee has already been paid and for which the same costs will be incurred. The Challenger of Record is protected from any danger of being out of pocket by virtue of art 29.3”.*

## ACAP JURISDICTION

18. The Arbitration Panel has jurisdiction over this matter pursuant to art. 53.4(a) of the Protocol and, accordingly, the ACAP Rules of procedure (version as at 11 February 2019) (the “**RoP**”) apply to these proceedings.

19. Words used in this Decision have the meaning as defined in the RoP.

## DECISION

### *Applicable rules*

20. Article 2.1 of the Protocol provides as follows:

**“2. AMERICA’S CUP PRELIMINARY REGATTAS.**

2.1. *Except as specified in 2.5 below, COR shall organise and conduct the Preliminary Regattas, which are comprised of:*

a) *the America’s Cup World Series regattas (“ACWS”), which shall comprise of three events that will take place throughout 2020 as follows:*

*i. Cagliari, Italy during 23 – 26 April 2020;*

*ii. Portsmouth, United Kingdom during 4 – 7 June 2020; and*

*iii. Auckland, New Zealand during 17 – 20 December 2020 (incorporated within the same period of the Christmas Race);*

b) *the America’s Cup Christmas Race to be held at the Match venue within the same period of the Auckland ACWS regatta during 17 – 20 December 2020 (“Christmas Race”);*

*The ACWS and the Christmas Race are jointly referred to as “Preliminary Regattas”.*

**See Protocol Amendment 07”.**

21. Article 2.3 of the Protocol provides as follows:

*“Each Competitor shall be required to enter and participate in the Christmas Race to be held at the venue of the Match between the 10th and 20th of December 2020 and no entry fees shall be due. Any Challenger not meeting this requirement shall no longer be eligible to participate in the Challenger Selection Series”.*

22. Article 7.6(a) of the Protocol provides as follows:

*“7.6. In addition to the fees referred to above, the following payments will be required and are deemed to be part of the Entry Fees:*

a) *except for the Portsmouth ACWS in respect of which Article 7.6 c) shall apply, (See Protocol Amendment 07) no later than 3 months before an ACWS Event, each Competitor shall pay to COR the sum of USD 300,000. Such amounts shall be paid into an ad hoc separate bank account in the name of the COR (“The Preliminary Regattas Account”) and shall be applied to the payment of any costs associated with the Preliminary Regattas; in the event of a positive balance, the surplus shall be applied to the costs associated with the CSS”*

23. Article 59 of the Protocol contains defined terms which are relevant in the context of this dispute; they are the following:

*“America’s Cup World Series or ACWS means a series of regattas with that title to be held in 2019 and 2020 as further described in Article 2” (p. 50);*

*“Events means the regattas that form part of AC36, including the America’s Cup World Series, the Christmas Cup, the America’s Cup Challenger Selection Series and the Match (including, in each case, any Special Events related thereto), each an Event” (p. 51);*

*“Preliminary Regattas means the Event being part of the ACWS and the Christmas Race” (p. 53).*

### **Background**

24. Article 52.1 of the Protocol specifically allows the Challenger of Record and the Defender (“**COR/D**”) to mutually agree to amend the Protocol. This has been done several times by COR/D, one of which is regarding Article 2.1 of the Protocol.
25. Such article originally provided one or two possible ACWS events in 2019 to be announced on or before 31 March 2019; three ACWS regattas in 2020 to be announced on or before 30 November 2019 and the America’s Cup Christmas Race to be held at the Match venue between 10 – 20 December 2020.
26. Amendment 07 to the Protocol governing the 36<sup>th</sup> America’s Cup (“**Amendment 07**”), signed by COR/D on 3 December 2019, amended Articles 2.1, 7.6(a) and 7.6(c). Art 2.1 of the Protocol now provides for a regatta in Cagliari in April 2020; a Regatta in Portsmouth in June 2020; and a third regatta in Auckland “*during 17 – 20 December 2020 (incorporated within the same period of the Christmas Race)*”. Amendment 07 also (i) added Article 7.6(c) to the Protocol in order to provide for an Entry Fee of USD 300’000 to be paid by each Competitor to RNZYS for the Portsmouth ACWS and (ii) accordingly “*Add[ed] the following words to the beginning of Article 7.6 a): a) except for the Portsmouth ACWS in respect of which Article 7.6 c) shall apply...*”.
27. The dates of the ACWS and of the Christmas Race were announced to the other Challengers through COR’s Notice to Competitors No. 8 (“**Notice 8**”) issued on November 30, 2019, which confidentially advised the other Competitors of the content of Amendment 07, which was published a few days after.
28. On 5 October 2020, the Minister of Transport made a “Declaration of a Major Maritime Event” in the New Zealand Gazette in which it stated (the “**Regulatory Permit**”):

*“Pursuant to section 200A(1) of the Maritime Transport Act 1994, and on the application from Auckland Council, I declare the three race events associated with*

*the 36th America's Cup to be an event to which section 200B of the Maritime Transport Act 1994 applies for:*

- *the Christmas Cup between 17 December 2020 and 20 December 2020 inclusive*
  - *the Prada Cup between 15 January 2021 and 24 February 2021 inclusive*
  - *the 36th America's Cup between 6 March 2021 and 21 March 2021 inclusive*”.
29. The authority giving the right to seek a regulatory permit is to be found in the Host Venue Agreement dated 4 April 2019 (“**HVA**”) between America's Cup Event Limited (“**ACE**”), Auckland Council, the Sovereign in Right of New Zealand acting by and through the Ministry of Business, Innovation and Employment (“**MBIE**”) and ETNZ. Clause 4.1 of the HVA defines the Events as follows: (i) the America's Cup Christmas Race (or such other name as may be selected by the Challenger of Record); (ii) the America's Cup Challenger Selection Series, known as the Prada Cup; (iii) the 36th America's Cup Match.

### **Discussion**

30. The main argument raised by the Competitors (other than COR) is that the Auckland ACWS “*is not a stand-alone regatta from the Christmas Race in respect of which no entry fee is payable*” (see for example §4 of ETNZ's Additional Submission).
31. As already said at §24 above, Article 52.1 of the Protocol specifically allows the Challenger of Record and the Defender (“**COR/D**”) to mutually agree to amend the Protocol. Articles 2.1 and 7.6 of the Protocol, as amended, are therefore binding on all Challengers.
32. Article 2.1 of the Protocol provides that the ACWS (America's Cup World Series regattas) shall comprise the Cagliari ACWS, the Portsmouth ACWS and the Auckland ACWS. The same article states that the (three) ACWS and the Christmas Race in turn compose the “Preliminary Regattas”.
33. Each of the (three) ACWS regattas and the Christmas Race are therefore four different and separate Events. This is confirmed by Art. 59 (p. 51) of the Protocol which states that “**Events means the regattas that form part of AC36, including the America's Cup World Series, the Christmas Cup, the America's Cup Challenger Selection Series and the Match (including, in each case, any Special Events related thereto), each an Event**” (emphasis added). The Panel therefore considers that the Auckland ACWS and the Christmas Race are two separate and stand-alone Events. The Auckland ACWS can therefore not be considered as a “paper regatta”, as alleged by the Applicant (at § 23 of the Application). The Auckland ACWS indeed has its own Race Conditions and trophy and is a different structured Event.

34. It is the Panel's view that the first sentence of Article 7.6(a) of the Protocol is non ambiguous and means that *"each Competitor shall pay to COR the sum of USD 300'000"* before each of the (three) ACWS regattas, with the (only) exception of the Portsmouth ACWS (to which Article 7.6(c) of the Protocol applies). In other words, the amount of USD 300'000 was, respectively is, payable for both the Cagliari ACWS and the Auckland ACWS, but not for the Portsmouth ACWS. The Panel thus rejects the Applicant's arguments that *"Art 7.6(a) provides for payment of only one fee of USD 300,000.00, not multiple fees of USD 300,000.00"* (§25.b. and §36-51 of the Application) and that *"a fee of USD300,000.00 paid for the ACWS Cagliari Regatta by a competitor satisfies their financial obligations under art 7.6(a)"*. A USD 300'000 Entry Fee is therefore due by each Competitor for the Auckland ACWS.
35. The issue is not what may have been envisaged or contemplated by ETNZ at the time of signing Amendment 07, as submitted by ETNZ in its Response to the Application (§4 and 8), but the clear wording of Article 7.6(a) of the Protocol as amended by said Amendment 07 is what must be applied. In its Response to the Application dated 23 October 2020, ETNZ seems to recognize, with the benefit of "retrospect", that the wording of Article 7.6(a) of the Protocol is more than capable of a different interpretation to what they had in mind at the time they executed it.
36. The Panel's task is to decide based on the clear wording of the Protocol, not to engage in what one may consider more fair and equitable, as submitted by the Applicant in its Reply to the Responses (§10).
37. The fact that the Auckland ACWS and the Christmas Race are *"incorporated within the same period"* and that they will therefore both take place between 17 and 20 December 2020 does not make them one and the same regatta. Also, the fact that there is one (as opposed to several) Regulatory Permit delivered by the Minister of Transport (on 5 October 2020) for the Christmas Race, the Prada Cup and the Match has no impact and does not – and cannot – affect what is provided in the Protocol regarding the fees payable by the teams in relation to the ACWS as provided in Article 7.6(a) of the Protocol.
38. One of the arguments raised by ETNZ in order to show that the Auckland ACWS and Christmas Race are *"the one and same regatta and no additional entry fee is payable"* is that *"There is no separate regulatory permit for the Auckland ACWS as a stand-alone regatta"* and that *"The wording of Clause 4.1 of the HVA is reflected in the s 200A Permit, the HVA did not provide any jurisdiction for ACE to seek a separate permit for the Auckland ACWS to be conducted "within the same period". It is in fact an adjunct of the Christmas Race and is able to be conducted under the permit issued for the period 17-20 December 2020"* (ETNZ, §6 of its Additional Submission).
39. These arguments are in the Panel's view not correct for the following reasons. (i) First because the HVA and the scope of the Regulatory Permit which has been asked for and obtained from the local authorities cannot have the effect of amending the clear wording of the Protocol (see below). (ii) Second because the

HVA was entered into on 4 April 2019 and that the Regulatory Permit was requested on that basis, while Amendment 07 (pursuant to which *inter alia* Article 7.6(a) and 7.6(c) of the Protocol were amended/added) was entered into on 3 December 2019, namely long after the HVA was signed. It is therefore wrong to suggest that the fact that the HVA and/or the Regulatory Permit delivered by the Minister of Transport do not mention the Auckland ACWS is to be construed as meaning that it is because the Christmas Race was at that time considered as including the Auckland ACWS.

40. The Applicant has submitted that costs will not be incurred by the Auckland ACWS in addition to the costs incurred by the Christmas Race and the *“failure of the Challenger of Record to offer any substantive evidence”* thereof (§3-4 and §10 of the Reply). The Panel considers that whether or not additional costs will be incurred is irrelevant, as the Protocol does not provide that this is a test or a requirement. Also, Article 7.6(a) of the Protocol is clear (and does not refer to additional costs as an element to take into consideration): a USD 300'000 Entry Fee is due by each Competitor for the Auckland ACWS.
41. The Applicant has also stated that *“The ACWS Auckland is no more than a belated subdivision of the Christmas Cup to meet third party obligations. It ought not be allowed to become, in the absence of evidence of substantial additional costs being incurred, an inequitable additional charge leading to an unjust enrichment”* (§9 of the Reply). The Panel is of the view that there is no unjust enrichment of COR in the present case as alleged by the Applicant. (i) First because the Entry Fee for the Auckland ACWS is due in accordance with a contract, i.e. the Protocol (Article 7.6(a)). (ii) Second because Article 29.1 of the Protocol provides that COR shall account for the receipt of all revenues as well as the payment of expenses. Pursuant to Articles 29.2 and 29.3 of the Protocol, any final surplus or funding shortfall of each Event shall be distributed (respectively, met) in accordance with the rules provided for in the Protocol. Also, as found in Case 36/07-03 Decision, *“Whether or not there was funding surplus or shortfall can therefore be determined only after the Preliminary Regattas and the CSS have been completed”* (§28) and *“The Panel may have to deal with this issue at a later point in time in case any Party files a submission to that effect”* (§30).
42. As a result of all of the above, the Panel orders that each Competitor shall pay to COR the sum of USD 300'000 within seven days as of the date of this Decision. No penalty shall be due by the Competitors, unless the afore-mentioned time limit is not complied with.

## **COSTS**

43. The Panel is mindful to decide that costs are to be shared equally between all Competitors, unless one or more of them submit otherwise within 5 days of this Decision. A final decision on costs will be taken by the Panel once this time limit has passed.

## DECISION

44. In summary the Panel finds that:

- a) The Christmas Race and the Auckland ACWS are two separate Events;
- b) Each Competitor shall pay, **within seven days as of the date of this Decision**, to COR the sum of USD 300'000 for the Auckland ACWS;
- c) The Panel will decide that costs are to be shared equally between all Competitors, unless one or more of them submit otherwise **within 5 days of this Decision**. A final decision on costs will be taken by the Panel once this time limit has passed.

David Tillett, Graham McKenzie, Henry Peter  
36th America's Cup Arbitration Panel